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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ODILON CIRA-RAMIREZ, Defendant.	Case No. 08CR2429-WQH DATE: September 2, 2008 TIME: 2:00 p.m. GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTIONS TO: (1) COMPEL DISCOVERY AND PRESERVE EVIDENCE; (2) DISMISS THE INDICTMENT FOR FAILURE TO ALLEGE *MENS REA*; (3) DISMISS THE RESULTING IN DEATH CHARGE AS UNCONSTITUTIONAL; (4) DISMISS THE AIDING AND ABETTING COUNTS; (5) BIFURCATE THE TRIAL; (6) SUPPRESS STATEMENTS AND EVIDENCE; (7) SUPPRESS IDENTIFICATION AND TESTIMONY; AND (8) GRANT LEAVE TO FILE FURTHER MOTIONS TOGETHER WITH A STATEMENT OF FACTS AND A MEMORANDUM OF POINTS AND AUTHORITIES

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COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Peter J. Mazza and David D. Leshner, Assistant United States Attorneys, and hereby files its response in opposition to Defendant Odilon Cira-Ramirez's above-captioned motions. Said response is based upon the files and records of this case, together with the attached statement of facts and accompanying memorandum of points and authorities.

I

STATEMENT OF THE CASE

A. THE CHARGE

On July 23, 2008, a grand jury sitting in the Southern District of California charged Defendant in a six-count indictment, charging: two counts of bringing in illegal aliens resulting in death, in violation of 8 U.S.C. § 1324(a)(1)(A)(i) and (a)(1)(B)(iv); one count of bringing in illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(i); and three counts bringing in illegal aliens for financial gain, in violation of 8 U.S.C. § 1324(a)(2)(B)(ii), and aiding and abetting, in violation of 18 U.S.C. § 2.

B. STATUS OF DISCOVERY

To date, the Government produced approximately 127 pages of written discovery and one DVD to Defendant. The materials produced include, inter alia: (1) investigative reports; (2) Defendant's criminal history; (3) photographs taken throughout the

investigation; and (4) post-arrest statements of Defendant and the material witness involved in the case.

II

STATEMENT OF FACTS

A. DEFENDANT LEADS GROUP FROM MEXICO INTO THE UNITED STATES

According to the lone surviving material witness, Moises Ramirez-Valdez, on July 7, 2008, at approximately 12:00 p.m., Defendant led Ramirez-Valdez and two other illegal aliens, Cristobal Camal-Chan and Antonio Aleman-Recho, north from a location just south of the United States-Mexico border into the United States. Ramirez-Valdez later stated this was the third time in the span of one week that he had tried to cross into the United States with Cira-Ramirez as his guide. Ramirez-Valdez stated that the group walked until approximately 10:00 p.m. on July 7, 2008 before stopping for the night. The group began walking north early the next morning on July 8, 2008. The four men had consumed most of their water by approximately 10:00 a.m. At approximately 12:00 p.m., Camal-Chan became delirious, and could not continue. Defendant told Ramirez-Valdez and Aleman-Recho to wait with Camal-Chan while Defendant went ahead to look for water. Camal-Chan died soon thereafter.

At approximately 1:00 p.m., Ramirez-Valdez and Aleman-Recho began walking north in search of water and assistance. Only 30 minutes later, however, Aleman-Recho also became delirious and could not continue walking. Ramirez-Valdez left him on the side of the trail and continued in search of help.

Ramirez-Valdez called out for help as he, too, began feeling delirious. Gerardo Salto-Rocha, charged in a separate indictment in case 08CR2430-BTM, responded to Ramirez-Valdez's calls for help. The two walked together for a brief while before Salto-Rocha could not continue. Salto-Rocha informed Ramirez-Valdez that a road was only a few hundred yards north. Ramirez-Valdez continued north. He quickly came upon Defendant Cira-Ramirez and the two went back to Salto-Rocha's location. According to Ramirez-Valdez, Cira-Ramirez and Salto-Rocha greeted each other like they knew each other and discussed leaving their respective groups behind. Defendant and Salto-Rocha then told Ramirez-Valdez to wait for them while they went east in search of water. Ramirez-Valdez decided to continue north to the road, however.

B. AGENTS RESCUE SURVIVORS AND APPREHEND DEFENDANT

Ramirez-Valdez made it to California State Route 2 at approximately 4:00 p.m. on July 8, 2008. Approximately one hour later, United States Border Patrol Agent (USBP) Keith Busiere saw Ramirez-Valdez on the side of the road, and immediately observed that he was suffering from exposure. After receiving medical treatment, Ramirez-Valdez accompanied USBP agents to look for other survivors. They encountered the body of Aleman-Recho approximately 15 minutes later near where Ramirez-Valdez had left him.

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Agents returned Ramirez-Valdez to State Route 2 for additional medical treatment, while other agents continued to look for other survivors. Agents soon found two survivors from Salto-Rocha's group, as well as the body of Camal-Chan.

While agents continued to tend to the survivors on State Route 2, an unidentified motorist stopped to alert agents to the presence of two individuals walking along State Route 2. Border Patrol Agent Correa responded, and quickly found two individuals later identified as Cira-Ramirez and Salto-Rocha. While USBP agents provided medical care to Cira-Ramirez, Ramirez-Valdez identified him as the footguide who had led his group into the United States and abandoned them. Border Patrol agents took Cira-Ramirez to the hospital for additional care.

C. STATEMENTS MADE BY DEFENDANT

At approximately 5:40 a.m., on July 9, 2008, Defendant was released from the hospital. At that time, USBP agents encountered him and conducted an immigration inquiry. Defendant admitted to being a Mexican citizen without legal authority to enter or reside in the United States. Agents took Defendant into custody and transported him to the Murrieta, California Border Patrol Station.

At approximately 12:00 p.m., USBP agents advised Cira-Ramirez of his Miranda rights, which he waived. Defendant again stated that he was a Mexican citizen and that his parents were Mexican citizens, as well. He further admitted to not having any legal documents that would allow him to lawfully enter or remain in the United States. Cira-Ramirez, however, denied being a footguide.

He stated that he made arrangements with an unknown alien smuggler in Tijuana, Mexico before crossing into the United States in a group of six or seven. Defendant stated that this was the first time he had crossed using this route. Defendant did admit to being related to Salto-Rocha by marriage.

D. STATEMENTS BY MATERIAL WITNESS RAMIREZ-VALDEZ

On July 9, 2008, at approximately 11:09 a.m., USBP agents interviewed Material Witness Ramirez-Valdez. In addition to the facts detailed above, Ramirez-Valdez stated that he was a citizen and native of Mexico and that he did not have any documents that would allow him to enter or remain in the United States lawfully. He stated that he made arrangements with an unknown smuggler in Tijuana, Mexico to be smuggled into the United States for $2,000. Ramirez-Valdez told agents that he intended to go to Los Angeles, California.

III

DEFENDANT'S MOTIONS

A. MOTION TO COMPEL DISCOVERY

In an attempt at simplification, this memorandum will address two specific areas of discovery: (1) items which the Government either has provided or will voluntarily provide; and (2) items demanded and discussed by Defendant which go beyond the strictures of Rule 16 and are not discoverable.

1. Items Which The Government Has Already Provided Or Will Voluntarily Provide

a. The Government will disclose to Defendant and make available for inspection, copying or photographing: any relevant

written or recorded statements made by Defendant, or copies thereof, within the possession, custody, or control of the Government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the Government; and that portion of any written record containing the substance of any relevant oral statement made by Defendant whether before or after arrest in response to interrogation by any person then known to Defendant to be a Government agent. The Government will also to Defendant the substance of any other relevant oral statement made by Defendant whether before or after arrest in response to interrogation by any person then known by Defendant to be a Government agent if the Government intends to use that statement at trial.

b. The Government will permit Defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the Government, and which are material to the preparation of Defendant's defense or are intended for use by the Government as evidence during its case-in-chief at trial, or were obtained from or belong to Defendant;[1/]

1/ Rule 16(a)(1)(C) authorizes defendants to examine only those Government documents material to the preparation of their defense against the Government's case-in-chief. United States v. Armstrong, 116 S. Ct. 1480 (1996). Further, Rule 16 does not require the disclosure by the prosecution of evidence it intends to use in rebuttal. United States v. Givens, 767 F.2d 574 (9th Cir. 1984), cert. denied, 474 U.S. 953 (1985).

c. The Government will permit Defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are in the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the Government, and which are material to the preparation of his defense or are intended for use by the Government as evidence during its case-in-chief at trial;[2/]

d. The Government has furnished to Defendant a copy of his prior criminal record, which is within its possession, custody or control, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the Government;

e. The Government will disclose the terms of all agreements (or any other inducements) with cooperating witnesses, if any are entered into;

f. The Government may disclose the statements of witnesses to be called in its case-in-chief when its trial memorandum is filed;[3/]

2/ The Government does not have "to disclose every single piece of paper that is generated internally in conjunction with scientific tests." United States v. Iglesias, 881 F.2d 1519 (9th Cir. 1989), cert. denied, 493 U.S. 1088 (1990).

3/ Production of these statements is governed by the Jencks Act and need occur only after the witness testifies on direct examination. United States v. Mills, 641 F.2d 785, 789-790 (9th Cir.), cert. denied, 454 U.S. 902 (1981); United States v. Dreitzler, 577 F.2d 539, 553 (9th Cir. 1978), cert. denied, 440 U.S. 921 (1979); United States v. Walk, 533 F.2d 417, 418-419 (9th

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g. The Government will disclose any record of prior criminal convictions that could be used to impeach a Government witness prior to any such witness' testimony;

h. The Government will disclose in advance of trial the general nature of other crimes, wrongs, or acts of Defendant that it intends to introduce at trial pursuant to Rule 404(b) of the Federal Rules of Evidence;

i. The Government acknowledges and recognizes its continuing obligation to disclose exculpatory evidence and discovery as required by Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), Jencks and Rules 12 and 16 of the Federal Rules of Criminal Procedure, and will abide by their dictates.[4/]

(...continued)
Cir. 1975). For Jencks Act purposes, the Government has no obligation to provide the defense with statements in the possession of a state agency. United States v. Durham, 941 F.2d 858 (9th Cir. 1991). Prior trial testimony does not fall within the scope of the Jencks Act. United States v. Isigro, 974 F.2d 1091, 1095 (9th Cir. 1992). Further, an agent's recorded radio transmissions made during surveillance are not discoverable under the Jencks Act. United States v. Bobadilla-Lopez, 954 F.2d 519 (9th Cir. 1992). The Government will provide the grand jury transcripts of witnesses who have testified before the grand jury if said testimony relates to the subject matter of their trial testimony. Finally, the Government reserves the right to withhold the statement of any particular witness it deems necessary until after the witness testifies.

[4/] Brady v. Maryland requires the Government to produce all evidence that is material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963). The Government's failure to provide the information required by Brady is constitutional error only if the information is material, that is, only if there is a reasonable probability that the result of the proceeding would

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2. Items Which Go Beyond The Strictures Of Rule 16

a. The Requests By The Defendants For Specific Brady Information Or General Rule 16 Discovery Should Be Denied

Defendant requests that the Government disclose all evidence favorable to him, which tends to exculpate him, or which may be relevant to any possible defense or contention they might assert.

It is well-settled that prior to trial, the Government must provide a defendant in a criminal case with evidence that is both favorable to the accused and material to guilt or punishment. Pennsylvania v. Richie, 480 U.S. 39, 57 (1987); United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83, 87 (1963). As the Court explained in United States v. Agurs, 427 U.S. 97, 104 (1976), "a fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence may have affected the outcome of the trial." Thus, under Brady, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985) (emphasis added). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

[4/](...continued)
have been different had the information been disclosed. Kyles v. Whitley, 115 S. Ct. 1555 (1995). However, neither Brady nor Rule 16 require the Government to disclose inculpatory information to the defense. United States v. Arias-Villanueva, 998 F.2d 1491 (9th Cir. 1993).

Pennsylvania v. Richie, 480 U.S. at 57 (quoting United States v. Bagley, 473 U.S. at 682).

The Supreme Court has repeatedly held that the Brady rule is not a rule of discovery; rather, it is a rule of fairness and is based upon the requirement of due process. United States v. Bagley, 473 U.S. at 675, n. 6; Weatherford v. Bursey, 429 U.S. at 559; United States v. Agurs, 427 U.S. at 108. The Supreme Court's analysis of the limited scope and purpose of the Brady rule, as set forth in the Bagley opinion, is worth quoting at length:

> Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. [footnote omitted]. Thus, the prosecutor is not required to deliver his entire file to defense counsel,[5/] but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial: "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and **absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose . . . but to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."**

United States v. Bagley, 473 U.S. at 675 (quoting United States v. Agurs, 427 U.S. at 108) (emphasis added); see also Pennsylvania v.

[5/] See United States v. Agurs, 427 U.S. 97, 106 (1976); Moore v. Illinois, 408 U.S. 786, 795 (1972). See also California v. Trombetta, 467 U.S. 479, 488, n. 8 (1984). An interpretation of Brady to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present system of criminal justice." Giles v. Maryland, 386 U.S. 66, 117 (1967) (Harlan, J., dissenting). Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgements.

Richie, 480 U.S. at 59 ("A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files.").

b. Defendants' Motion For Disclosure Of Witness Information Should Be Denied Except As Is Agreed To By The Government

Defendant seeks numerous records and information pertaining to potential Government witnesses. Regarding these individuals, the Government will provide Defendant with the following items prior to any such individual's trial testimony:

(1) The terms of all agreements (or any other inducements) it has made with cooperating witnesses, if they are entered into;

(2) All relevant exculpatory evidence concerning the credibility or bias of Government witnesses as mandated by law; and,

(3) Any record of prior criminal convictions that could be used to impeach a Government witness.

The Government opposes disclosure of rap sheet information of any Government witness prior to trial because of the prohibition contained in the Jencks Act. See United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976), cert. denied, 429 U.S. 1074 (1977). Furthermore, any uncharged prior misconduct attributable to Government witnesses, all promises made to and consideration given to witnesses by the Government, and all threats of prosecution made to witnesses by the Government will be disclosed

if required by the doctrine of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 450 U.S. 150 (1972).

c. The Rough Notes Of Our Agents

Although the Government has no objection to the preservation of agents' handwritten notes, we object to their production at this time. Further, the Government objects to any pretrial hearing concerning the production of rough notes. If during any evidentiary proceeding, certain rough notes become relevant, these notes will be made available.

Prior production of these notes is not necessary because they are not "statements" within the meaning of the Jencks Act unless they comprise both a substantially verbatim narrative of a witness' assertions and they have been approved or adopted by the witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980); see also United States v. Kaiser, 660 F.2d 724, 731-32 (9th Cir. 1981); United States v. Griffin, 659 F.2d 932, 936-38 (9th Cir. 1981).

d. Government Reports, Summaries, And Memoranda

Rule 16, in pertinent part, provides:

> [T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agent in connection with the investigating or prosecuting of the case.

This subsection exempts from disclosure documents prepared by government attorneys and agents that would otherwise be discoverable under Rule 16. United States v. Fort, 472 F.3d 1106, 1110 & n.2 (9th Cir. 2007).

The Government, as expressed previously, recognizes and embraces its obligations pursuant to Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 450 U.S. 150 (1972), Rule 16, and the Jencks Act.[6/] We shall not, however, turn over internal memoranda or reports which are properly regarded as work product exempted from pretrial disclosure.[7/] Such disclosure is supported neither by the Rules of Evidence nor case law and could compromise other areas of investigation still being pursued.

e. Defendants Are Not Entitled To Addresses Of Government Witnesses

Defendant requests the name and last known address of each prospective Government witness. While the Government may supply a tentative witness list with its trial memorandum, it objects to providing home addresses. See United States v. Sukumolachan, 610 F.2d 685, 688 (9th Cir. 1980), and United States v. Conder, 423 F.2d 904, 910 (9th Cir. 1970) (addressing defendant's request for the addresses of actual Government witnesses). A request for the home addresses of Government witnesses is tantamount to a request for a witness list and, in a non-capital case, there is no legal requirement that the Government supply defendant with a list of the witnesses it expects to call at trial. United States v.

6/ Summaries of witness interviews conducted by Government agents (DEA 6, FBI 302) are not Jencks Act statements. United States v. Claiborne, 765 F.2d 784, 801 (9th Cir. 1985). The production of witness interview is addressed in more detail below.

7/ The Government recognizes that the possibility remains that some of these documents may become discoverable during the course of the trial if they are material to any issue that is raised.

Thompson, 493 F.2d 305, 309 (9th Cir.), cert. denied, 419 U.S. 835 (1974); United States v. Glass, 421 F.2d 832, 833 (9th Cir. 1969).[8/]

The Ninth Circuit addressed this issue in United States v. Jones, 612 F.2d 453 (9th Cir. 1979), cert. denied, 445 U.S. 966 (1980). In Jones, the court made it clear that, absent a showing of necessity by the defense, there should be no pretrial disclosure of the identity of Government witnesses. Id. at 455. Several other Ninth Circuit cases have reached the same conclusion. See, e.g., United States v. Armstrong, 621 F.2d 951, 1954 (9th Cir. 1980); United States v. Sukumolachan, 610 F.2d at 687; United States v. Paseur, 501 F.2d 966, 972 (9th Cir. 1974) ("A defendant is not entitled as a matter of right to the name and address of any witness.").

f. Motion Pursuant To Rule 12(d)

Defendant is hereby notified that the Government intends to use in its case-in-chief at trial all evidence which Defendant is entitled to discover under Rule 16, subject to any relevant limitations prescribed in Rule 16.

[8/] Even in a capital case, the defendant is only entitled to receive a list of witnesses three days prior to commencement of trial. 18 U.S.C. § 3432. See also United States v. Richter, 488 F.2d 170 (9th Cir. 1973)(holding that defendant must make an affirmative showing as to need and reasonableness of such discovery). Likewise, agreements with witnesses need not be turned over prior to the testimony of the witness, United States v. Rinn, 586 F.2d 1113 (9th Cir. 1978), and there is no obligation to turn over the criminal records of all witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976); United States v. Egger, 509 F.2d 745 (9th Cir.), cert. denied, 423 U.S. 842 (1975); United States v. Cosby, 500 F.2d 405 (9th Cir. 1974).

g. Defendant's Motion For Disclosure Of Oral Statements Made To Non-Government Witnesses Should Be Denied

Defendants are not entitled to discovery of oral statements made by them to persons who were not - at the time such statements were made - known by the defendants to be Government agents. The plain language of Rule 16 supports this position. Rule 16 unambiguously states that defendants are entitled to "written and recorded" statements made by them. The rule limits discovery of oral statements to "that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a Government agent," and "the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a Government agent if the Government intends to use that statement at trial." The statutory language clearly means that oral statements are discoverable only in very limited circumstances, and then, only when made to a known Government agent.

h. Personnel Files Of Federal Agents

Pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984), the Government agrees to review the personnel files of its federal law enforcement witnesses and to "disclose information favorable to the defense that meets the appropriate standard of materiality . . . ." United States v. Cadet, 727 F.2d at 1467-68. Further,

if counsel for the United States is uncertain about the materiality of the information within its possession, the material will be submitted to the court for in-camera inspection and review. In this case, the Government will ask the affected law enforcement agency to conduct the reviews and report their findings to the prosecutor assigned to the case. In United States v. Jennings, 960 F.2d 1488 (9th Cir. 1992), the Ninth Circuit held that the Assistant U.S. Attorney assigned to the prosecution of the case has no duty to personally review the personnel files of federal law enforcement witnesses. In Jennings, the Ninth Circuit found that the present Department of Justice procedures providing for a review of federal law enforcement witness personnel files by the agency maintaining them is sufficient compliance with Henthorn. Jennings, 960 F.2d at 1492. In this case, the Government will comply with the procedures as set forth in Jennings.

Finally, the Government has no duty to examine the personnel files of state and local officers because they are not within the possession, custody or control of the Federal Government. United States v. Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992).

i. Reports Of Witness Interviews

Defendant has requested the production of all reports generated in connection with witness interviews. To date, the Government does not have any reports regarding witness interviews or otherwise that have not been turned over to Defendant. However, to the extent that such additional reports regarding

witness interviews are generated, the information sought by Defendant is not subject to discovery under the Jencks Act, 18 U.S.C., Section 3500. In Jencks v. United States, 353 U.S. 657 (1957), the Supreme Court held that a criminal defendant had a due process right to inspect, for impeachment purposes, statements which had been made to government agents by government witnesses. Such statements were to be turned over to the defense at the time of cross-examination if their contents related to the subject matter of the witness' direct testimony, and if a demand had been made for specific statements of the witness. Id. at 1013-15. The Jencks Act, 18 U.S.C., Section 3500, was enacted in response to the Jencks decision. As the Supreme Court stated in an early interpretation of the Jencks Act:

> Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations. The committee reports of the Houses and the floor debates clearly manifest the intention to avoid these dangers by restricting the production to those statements defined in the bill.

Palermo v. United States, 360 U.S. 343, 350 (1959). Having examined the legislative history and intent behind enactment of the Jencks Act, the Court concluded, "[t]he purpose of the Act, its fair reading and its overwhelming legislative history compel us to hold that statements of a government witness made to an

agent of the government which cannot be produced under the terms of 18 U.S.C. § 3500, cannot be produced at all."

Reports generated in connection with a witness's interview session are only subject to production under the Jencks Act if the witness signed the report, or otherwise adopted or approved the contents of the report. See 18 U.S.C. § 3500(e)(1); see also United States v. Miller, 771 F.2d 1219, 1231-31 (9th Cir. 1985) ("The Jencks Act is, by its terms, applicable only to writings which are signed or adopted by a witness and to accounts which are substantially verbatim recitals of a witnesses' oral statements."); United States v. Friedman, 593 F.2d 109, 120 (9th Cir. 1979) (an interview report that contains a summary of a witness' statements is not subject to discovery under the Jencks Act); United States v. Augenblick, 393 U.S. 248, 354-44 (1969) (rough notes of witness interview not a "statement" covering entire interview). Indeed, "both the history of the [Jencks Act] and the decisions interpreting it have stressed that for production to be required, the material should not only reflect the witness' own words, but should also be in the nature of a complete recital that eliminates the possibility of portions being selected out of context." United States v. Bobadilla-Lopez, 954 F.2d 519, 522 (9th Cir. 1992). As recognized by the Supreme Court, "the [Jencks Act] was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital." Id. The defendants should not be allowed access to reports which

they cannot properly use to cross-examine the Government's witnesses.

j. Expert Witnesses

The Government will disclose to Defendant the name, qualifications, and a written summary of testimony of any expert the Government intends to use during its case-in-chief at trial pursuant to Fed. R. Evid. 702, 703, or 705 three weeks prior to the scheduled trial date.

k. Other Discovery Requests

To the extent that the above does not answer all of Defendant's discovery requests, the Government opposes the motions on the grounds that there is no authority requiring us to provide such material.

B. MOTION TO DISMISS INDICTMENT RE AIDING AND ABETTING

Defendant argues that the Court should dismiss the Indictment or, alternatively, preclude the Government from proceeding under an aiding and abetting theory. Defendant argues that the Indictment is defective because it fails to charge him with the necessary *mens rea* for aiding and abetting. These contentions should be rejected.

1. Aiding and abetting mens rea

An indictment need only contain those facts and elements so that the defendant may prepare a defense and invoke the Double Jeopardy clause when appropriate. See United States v. Gondinez-Rabadan, 289 F.3d 630, 634 (9th Cir. 2002). An indictment that sets forth the charged offense in the words of the statute itself

is generally sufficient. United States v. Johnson, 804 F.2d 1078, 1084 (9th Cir. 1986). An indictment that puts a defendant on notice of the elements of the offense, even if only by citation to the statutory provision involved, is also sufficient. United States v. Gelzer, 50 F.3d 1133, 1138 (2d Cir. 1995); United States v. Oakie, 12 F.3d 1436, 1440-41 (8th Cir. 1993); United States v. Blackburn, 9 F.3d 353, 357 (5th Cir. 1993).

The Indictment in this case tracks the applicable statutory language, provides citations to the applicable statutes at issue, and more than adequately apprises Defendant of the crimes charged. Contrary to Defendant's assertions, count 1 charging Defendant with bringing in an illegal alien for financial gain and aiding and abetting in that crime is not defective. See United States v. Ramirez-Martinez, 273 F.3d 903, 911 (9th Cir. 2001) (Indictment charging a defendant with violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2 was not defective); United States v. Angwin, 271 F.3d 786, 800 (9th Cir. 2001) (affirming decision to deny the defendant's motion to dismiss the count charging violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2), cert. denied, 535 U.S. 966 (2002); Accord United States v. Lopez, 484 F.3d 1186, 1199-1200 (9th Cir. 2007) (aiding and abetting liability "cannot be rejected as a matter of law"; even one who does not physically transport aliens across the border may

be held criminally liable for aiding and abetting a "brings to" offense under certain circumstances).[9/]

Defendant's reliance on United States v. Du Bo, 186 F.3d 1177 (9th Cir. 1999) is misplaced. In Du Bo, the defendant's indictment failed to include a mens rea because the indictment only cited to the Hobbs Act. Id. at 1179. Here, unlike Du Bo, the Indictment includes the requisite mens rea. An essential element of aiding and abetting liability is "that the accused had the requisite intent of the underlying substantive offense." United States v. Sayetsitty, 107 F.3d 1405, 1412 (9th Cir. 1997); see also United States v. Gaskins, 849 F.2d 454, 459 (9th Cir. 1988) (Given that "the intent regarding the underlying substantive offense required to convict a defendant as an aider and abettor is the same intent necessary to convict him as a principal," the intent element was not missing from the original indictment.").

Furthermore, "aiding and abetting is implied in every federal indictment for a substantive offense." See, e.g., United States v. Armstrong, 909 F.2d 1238, 1241 (9th Cir. 1990). Aiding and abetting is not a distinct offense from the underlying substantive crime. United States v. Garcia, 400 F.3d 816, 820 (9th Cir. 2005) ("Aiding and abetting is simply one means of committing a single crime."). "Every indictment for a federal offense charges the

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[9/] In this case, Defendant, a foot guide who led the group into the United States was the initial transporter and he had not yet dropped the aliens off at a location within the United States. Hence, the crime was not yet complete and aiding and abetting is properly charged. Lopez, 483 F.3d at 1199-1200.

defendant as a principal and as an aider and abettor; thus a count for aiding and abetting is unnecessary." United States v. Cannon, 993 F.2d 1439, 1442 (9th Cir. 1993). Accordingly, the Government is free to proceed on an aiding and abetting theory.

2. Knowledge

Count One of the Indictment alleges that Defendant acted "with the intent to violate the immigration laws of the United States . . ." This allegation adequately alleges the requisite mens rea for a violation of § 1324(a)(1)(A)(i). See United States v. Nguyen, 73 F.3d 887, 893 (9th Cir. 1995) ("to convict a person of violating section 1324(a)(1)(A), the government must show that the defendant acted with criminal intent"). Neither Nguyen nor the Ninth Circuit model jury instructions impose the additional scienter requirement proposed by Defendant – that he know the alien was brought to the United States at a place other than a designated port of entry. See Ninth Circuit Model Jury Instruction No. 9.1. To the contrary, the Government may establish a violation of § 1324(a)(1)(A) by proving that Defendant acted with the intent to violate the immigration laws of the United States. The Indictment so alleges, and there is no basis to dismiss Count One on this ground.

C. SECTION 1324 IS NOT UNCONSTITUTIONAL UNDER APPRENDI

As Defendant recognizes, controlling Ninth Circuit law forecloses his argument that § 1324 is unconstitutional under Apprendi because the trial judge determines the statutory maximum penalties for such an offense rather than the jury. See United

States v. Matus-Leva, 311 F.3d 1214, 1217 (9th Cir. 2002)("No genuine issue is presented under Apprendi or its progeny."). As the Ninth Circuit expressly held there, "[t]his argument is wholly without merit." Id.

The Ninth Circuit explained that the circumstances in Matus-Leva, which also involved an § 1324 "resulting in death" indictment, "do[] not come within the literal terms or the reasoning of Apprendi, because this case does not involve sentencing factors to be decided by a judge that increase the penalty beyond the statutory maximum." Id.

D. THE COURT NEED NOT APPLY A MENS REA TO THE SENTENCING FACTORS

As Defendant also recognizes, his argument that the *mens rea* requirements for the various § 1324 offenses must attach to the sentencing factors is also foreclosed by United States v. Matus-Leva, 311 F.3d at 1218-19 (9th Cir. 2002) ("Matus-Leva argues that the 'resulting in . . . death'. . . provision has no explicit *mens rea* requirement, and so it is void for vagueness because it could be applied to a defendant even if the death had nothing to do with the smuggling. That argument lacks merit."). In fact, as demonstrated by the analysis in United States v. Nguyen, 73 F.3d 887, 894 (9th Cir. 1995), the Ninth Circuit explained that section 1324 does "have a *mens rea* requirement, namely that the alleged smuggler intend to violate the immigration laws." Id. at 1219. Thus, the Ninth Circuit rejected this challenge.

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E. MOTION TO DISMISS "RESULTING IN DEATH" CHARGE

1. The Absence of Mens Rea Attached to the Death Resulting Factor Does Not Render the Statute Unconstitutionally Disproportionate

Defendant claims that, if the court does not impose a mens rea requirement, § 1324(a)(1)(B)(iv) is defective because it authorizes the death penalty for conduct that does not satisfy the bare minimum mens rea requirement for imposition of the death penalty – "reckless indifference to human life in the course of committing a violent felony." [Def. Mem. at 14.]

In relevant part the portion of § 1324 that Defendant attacks as unconstitutionally disproportionate reads as follows:

> (B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs –
>
> . . . .
>
> (iv) in the case of a violation of subparagraph (A)(I) . . . resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under Title 18, or both.

Id. This facial constitutional attack on the subparagraph is based on the premise that since the death penalty could be imposed, and since the subparagraph does not narrow the class of persons eligible for the death penalty (i.e., those who at a minimum act with "reckless indifference to human life in the course of committing a violent felony"), the overreaching of the subparagraph makes its disproportionality a constitutional defect.

Defendant's complaint appears to be that the statute gives no guidance as to who would be eligible for the death penalty because: (1) "as the 'least culpable mental state the Supreme Court has held death eligible is reckless indifference to human

life in commission of a felony.'" (Emphasis in original) (Def. Mem. at 15 [quoting United States v. Cheely, 36 F.3d 1439 and n.9 (9th Cir. 1994))]; and (2) the statute does not "genuinely narrow the class of persons eligible for the death penalty." Id.

First, this argument is premature because the United States has yet to inform the Court and the parties whether the death penalty will be sought in this case. The Court need not rule on the constitutionality of the statute unless and until the United States gives notice that it will seek the death penalty against Defendant. Prior to such notice, a determination whether the "resulting in death" provision of § 1324 would be tantamount to an advisory opinion.

Second, while if it is true that § 1324(a)(1)(B)(iv) does not indicate the criteria as to who would be eligible for the death penalty, it does not need to. All federal death penalty eligible criteria are contained in the Federal Death Penalty Act, 18 U.S.C. § § 3591 et. seq. See United States v. Fernandez, 231 F.3d 1240, 1243 (9th Cir. 2000). In fact, the Fifth Circuit has held, "[t]he FDPA provides sufficient safeguards to prevent the arbitrary imposition of the death penalty." United States v. Jones, 132 F.3d 232, 241 (5th Cir. 1998)(Defendant convicted of kidnaping with death resulting, in violation of 18 U.S.C. § 1201.) That is because "[s]ection 3591(a) codifies the command in Enmund, 458 U.S. at 797, 102 S.Ct. 3368, and Tison, 481 U.S. at 157, 107 S.Ct. 1676, to limit the imposition of the death penalty to those murderers who both undertake felony participation and demonstrate

at least reckless indifference to human life." United States v. Webster, 162 F.3d 308, 355 (5th Cir. 1998).

2. The Absence of Mens Rea Does Not Render the Statute Unconstitutionally Vague

As Defendant again recognizes, Ninth Circuit law forecloses his argument that § 1324 is unconstitutionally vague absent a superimposed mens rea element. See Matus-Leva, 311 F.3d at 1219. In fact, a plain reading of the statute demonstrates that the only prerequisite to the application of the statute is for an alien to die as a result of a violation of the statute. Surely, an "ordinary person" who reads this statute and then decides to make money by guiding a group of undocumented aliens through treacherous terrain from Mexico into the United States and into a vehicle that crashes killing one or more occupants would not be surprised to learn that he or she was subject to the penalties of this provision. This portion of the statute is hardly, "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." Kolender v. Lawson, 461 U.S. 352 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)). First, "[w]here a law at issue does not implicate First Amendment rights, it may be challenged for vagueness only as applied, unless the enactment is impermissibly vague in all of its applications. Easyriders Foundation F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1493-94 (9th Cir. 1997). Thus, Defendant may only challenge § 1324 only as applied or if it is impermissibly vague in all its applications. Id. The Ninth Circuit has summarily rejected arguments that § 1324 is vague on numerous occasions.

See, e.g., United States v. Moreno, 561 F.2d 1321, 1322 (9th Cir. 1977); United States v. Gonzalez-Hernandez, 534 F.2d 1353, 1354 (9th Cir. 1976).

Here, the United States alleges that Defendant was engaged in alien smuggling across the United States border which actively resulted in death. Section 1324 clearly provides notice that this activity is prohibited and will result in specific penalties, and a sufficient guideline that does not encourage arbitrary enforcement by law enforcement officials. Accordingly, section 1324(a)(1)(B)(iv) is not unconstitutionally vague, and Defendant is entitled to no relief.

F. MOTION TO DISMISS BECAUSE CONGRESS DID NOT INTEND AIDING AND ABETTING LIABILITY UNDER § 1324

Defendant concedes that United States v. Angwin, 271 F.3d 786, 800-804 (9th Cir. 2001), forecloses this argument.

G. MOTION TO BIFURCATE TRIAL

Defendant claims that the court should bifurcate the trial of the "resulting in death" sentencing factor from the remaining issues in the case. He moves the court for this relief pursuant to Fed. R. Crim. P. 8 and 14, which read in pertinent part as follows:

Rule 8:

> (a) Two or more offenses may be charged in the same indictment. . . if the offenses charged, . . . are based on the same act or transaction.

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> Rule 14:
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> If it appears that a defendant . . . is prejudiced by a joinder of offenses. . ., the court may order . . . separate trials of counts, . . . or provide whatever other relief justice requires.

(Emphasis added.)

Defendant bears the burden of showing manifest prejudice. In fact, the best that he can offer is the discussion found in a footnote in the concurring opinion of Justice Thomas in Apprendi. That footnote reads as follows:

> In addition, it has been common practice to address this concern [introduction of prior conviction at trial] by permitting the defendant to stipulate to the prior conviction, in which case the charge of the prior conviction is not read to the jury, or , if the defendant decides not to stipulate, to bifurcate the trial, with the jury only considering the prior conviction after it has reached a guilty verdict on the core crime.

530 U.S. at 521 n.10 (citations omitted). First, according to Justice Thomas, this is a "practice," but it its not required. Second, the Ninth Circuit has, in fact, found the scenario addressed in the footnote does not require severance/bifurcation, and a district court does not abuse its discretion when it refuses to so order. United States v. Nguyen, 88 F.3d 812, 818 (9th Cir. 1996). Moreover, the interests of judicial economy in this case are significant given the overlap in witnesses and testimony in the "resulting in death" counts and the other counts under 8 U.S.C. § 1324. See Matus-Leva, 311 F.3d at 1217 ("Bifurcation of proceeding relating to death of the aliens he guided would have been judicially inefficient and was not necessary to give Matus-Leva a fair trial.").

H. MOTION TO SUPPRESS STATEMENTS AND EVIDENCE

1. Law enforcement agents complied with Miranda, and Defendant's statements were voluntary

A statement made in response to custodial interrogation is admissible under Miranda v. Arizona, 384 U.S. 437 (1966) and 18 U.S.C. § 3501 if a preponderance of the evidence indicates that the statement was made after an advisement of rights and was not elicited by improper coercion. See Colorado v. Connelly, 479 U.S. 157, 167-70 (1986) (preponderance of evidence standard governs voluntariness and Miranda determinations; valid waiver of Miranda rights should be found in the "absence of police overreaching"). Although the totality of circumstances, including characteristics of the defendant and details of the interview, should be considered, improper coercive activity must occur for suppression of any statement. See id. (noting that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'"); cf. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) ("Some of the factors taken into account have included the youth of the accused; his lack of education, or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep.") (citations omitted). While it is possible for a defendant to be in such a poor mental or physical condition that he cannot rationally waive his rights (and misconduct can be inferred based on police

knowledge of such condition, Connelly, 479 U.S. at 167-68), the condition must be so severe that the defendant was rendered utterly incapable of rational choice. See United States v. Kelley, 953 F.2d 562, 564 (9th Cir.1992) (collecting cases rejecting claims of physical/mental impairment as insufficient to prevent exercise of rational choice).

Here, the undisputed facts demonstrate that Defendant knowingly and voluntarily waived his Miranda rights. Following his apprehension on July 8, 2008, Defendant was determined to be suffering from mild dehydration and was taken to Palomar Hospital. Defendant was released from the hospital on the morning of July 9, 2008 and was taken into custody by Border Patrol at that time. Agents advised Defendant of his Miranda rights. Defendant acknowledged that he understood his rights, and he agreed to answer questions without the presence of an attorney. Simply put, law enforcement agents complied with Miranda, and Defendant fails to allege with any specificity that either the Miranda advisal or his ensuing waiver was improper.

The totality of circumstances further demonstrates that Defendant's post-arrest statements were voluntary. Significantly, Defendant has not submitted a declaration, and there is no evidence before the Court that he was subjected to coercive police activity. See, e.g., Clark v. Murphy, 331 F.3d 1062, 1073 (9th Cir. 2003) (upholding admission of statements where defendant was questioned over a five-hour period in a small room without toilet or water facilities). Based on the Government's proffer, the

Court can conclude by a preponderance of the evidence that Defendant knowingly and voluntarily waived his Miranda rights and that his subsequent statements were made voluntarily.

2. Defendant is not entitled to an evidentiary hearing

"An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist." United States v. Howell, 231 F.3d 616, 620 (9th Cir. 2000) (citation omitted). Local Criminal Rule 47.1(g)(1) provides, in relevant part:

> Criminal motions requiring predicate factual findings shall be supported by declaration(s) . . . . The Court need not grant an evidentiary hearing where either party fails to properly support its motion or opposition.

A District Court may properly deny a request for an evidentiary hearing on a motion to suppress evidence where the defendant does not submit a declaration pursuant to a local rule. United States v. Wardlow, 951 F.2d 1115, 1116 (9th Cir. 1991). See also United States v. Batiste, 868 F.2d 1089, 1093 (9th Cir. 1989) ("[T]he defendant, in his motion to suppress, failed to dispute any material fact in the government's proffer. In these circumstances, the district court was not required to hold an evidentiary hearing."); United States v. Moran-Garcia, 783 F. Supp. 1266, 1274 (S.D. Cal. 1991) (boilerplate motion containing indefinite and unsworn allegations held insufficient to require

evidentiary hearing on defendant's motion to suppress statements).[10/]

Here, Defendant's election not to submit a declaration is a plain violation of Local Rule 47.1(g). Further, the absence of a declaration prevents this Court from making a finding that disputed issues of fact exist in the first instance. Howell, 231 F.3d at 620. As such, the Court should deny Defendant's motion without an evidentiary hearing. Batiste, 868 F.2d at 1092 (Government proffer alone is adequate to defeat a motion to suppress where the defense fails to adduce specific and material disputed facts).

I. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY

1. The identification procedure was not impermissibly suggestive

a. Legal standards

Suppression of an identification "is appropriate only where the photospread was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." United States v. Beck, 418 F.3d 1008, 1012 (9th Cir. 2005) (citation omitted) (holding six-pack photospread not impermissibly suggestive). "To determine whether an identification procedure is impermissibly suggestive, we review the totality of the circumstances." United States v. Jones, 84 F.3d 1206, 1209 (9th

[10/] No rights are infringed by the requirement of such a declaration because the United States may not use the declaration at trial over the defendant's objection. Batiste, 868 F.2d at 1092.

Cir. 1996). If the procedure is not impermissibly suggestive, the inquiry ends. United States v. Bagley, 772 F.2d 482, 492 (9th Cir. 1985). On the other hand, if the procedure is impermissibly suggestive, the court must determine whether the identification testimony nevertheless is admissible because the identification is sufficiently reliable under the totality of the circumstances. Id.

b. The photospread was not impermissibly suggestive

Defendant contends in conclusory fashion that the six-pack photospread was impermissibly suggestive. He is wrong because the photospread included photos of six young, Hispanic males in the same age range. The Ninth Circuit has repeatedly rejected challenges to similar photospreads, even where those photospreads were more suggestive that the one at issue here. See, e.g., Beck, 418 F.3d at 1012 (photospread not impermissibly suggestive where "all six of the pictures are of Caucasian males in the same age range, with similar skin, eye and hair coloring"); United States v. Burdeau, 168 F.3d 352, 357-58 (9th Cir. 1999) (rejecting argument that photo array was impermissibly suggestive because defendant's picture was placed in the center of the array, was darker than the rest, and was the only one in which the eyes were closed.); United States v. Carbajal, 956 F.2d 924, 929 (9th Cir. 1992) (photospread not impermissibly suggestive where pictures depicted six Hispanic males in same age range); United States v. Hamilton, 792 F.2d 837, 840-41 (9th Cir. 1986) (photospread not unduly suggestive even though two of six photos were of the same

person and two others were nearly identical); United States v. Johnson, 820 F.2d 1065 (9th Cir. 1987) (upholding photospread identification even though defendant was the only person over the age of 30, two other persons were noticeably more clean shaven, and defendant's photo was hazier than other photos).

2. The identification was reliable in any event

Because the identification procedures employed in this case were not impermissibly suggestive, the Court need not separately determine whether the identification was reliable. Bagley, 772 F.2d at 492. But even where a court finds that a pretrial procedure is impermissibly suggestive, "automatic exclusion of identification testimony is not required." Id. "If under the totality of the circumstances the identification is sufficiently reliable, identification testimony may properly be allowed into evidence even if the identification was made pursuant to an unnecessarily suggestive procedure." Id.

"The factors we consider in evaluating the likelihood of misidentification include: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation." Jones, 84 F.3d at 1209-10 (citing Neil v. Biggers, 409 U.S. 188, 199-200 (1972)). See also United States v. Dring, 930 F.2d 687, 692-93 (9th Cir. 1991) (where witnesses were shown a single photo of defendant prior to trial,

district court properly found in-court identifications reliable and admissible).

a. Ramirez-Valdez' opportunity to view Defendant

It is apparent from both Ramirez' statements as well as Defendant's own admissions that they each had the opportunity to view the other over a period of time of at least 24 hours while their 4-person group walked from Mexico into the United States. Given this extended period of time and Ramirez-Valdez' close proximity to Defendant, there can be no reasonable dispute that Ramirez-Valdez had ample opportunity to view Defendant. See, e.g., United States v. Burnette, 698 F.2d 1038, 1046 (9th Cir. 1983) (identification reliable where bank teller viewed robber for 12 seconds and "his view was unobstructed and at close range").

b. Ramirez-Valdez' degree of attention

Given that Ramirez-Valdez was relying on Defendant to smuggle him into the United States, it stands to reason that he necessarily paid attention to Defendant and what Defendant instructed him to do. See, e.g., Jones, 84 F.3d at 1210 (witnesses' attention was focused on the defendant because they knew he was robbing the bank). Indeed, Defendant proffers no legitimate reason why Ramirez-Valdez' degree of attention was somehow lacking.

c. Accuracy of prior description

Although it does not appear that Ramirez-Valdez provided a description of Defendant prior to identifying Defendant in the

photospread, Ramirez-Valdez did immediately identify Defendant in the field as the group's foot guide.

d. Ramirez-Valdez' level of certainty

Ramirez-Valdez identified Defendant without hesitation both in the field and in the photospread lineup. This high level of certainty weighs in favor of reliability.

e. Length of time between crime and confrontation

Less than 24 hours elapsed between the time Ramirez-Valdez was rescued by Border Patrol agents and when he identified Defendant from a six-pack photospread. See, e.g., United States v. Simoy, 998 F.2d 751, 752 (9th Cir. 1993) (identification by witness six days after crime held reliable); Dring, 930 F.2d at 692-93 (identification two weeks after crime held reliable).

The five factors weigh in favor of a finding that Ramirez-Valdez' identification of Defendant was reliable. It is within the jury's province to evaluate Ramirez-Valdez' identification of Defendant against any evidence of suggestiveness. As the Ninth Circuit has noted:

> We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

United States v. Kessler, 692 F.2d 584, 587 (9th Cir. 1982) (citing Manson v. Braithwaite, 432 U.S. 98, 116 (1977)).

J. LEAVE TO FILE FURTHER MOTIONS

The Government does not oppose granting leave to bring further motions so long as those motions are based on evidence (if any) not yet produced in discovery.

IV

CONCLUSION

For the foregoing reasons, the Government requests that Defendant's motions be denied where indicated.

DATED: August 26, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ David D. Leshner
DAVID D. LESHNER
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ODILON CIRA-RAMIREZ, Defendant.	Case No. 08CR2429-WQH CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, DAVID D. LESHNER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of a Response to Defendant's DEFENDANT'S MOTIONS TO: (1) COMPEL DISCOVERY AND PRESERVE EVIDENCE; (2) DISMISS THE INDICTMENT FOR FAILURE TO ALLEGE *MENS REA*; (3) DISMISS THE RESULTING IN DEATH CHARGE AS UNCONSTITUTIONAL; (4) DISMISS THE AIDING AND ABETTING COUNTS; (5) BIFURCATE THE TRIAL; (6) SUPPRESS STATEMENTS AND EVIDENCE; (7) SUPPRESS IDENTIFICATION AND TESTIMONY; AND (8) GRANT LEAVE TO FILE FURTHER MOTIONS on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Andrew Lah, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 26, 2008.

s/ David D. Leshner
DAVID D. LESHNER